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TO: Royalston Zoning Study Committee & Royalston Board of Selectmen  
FR: Paul Bobrowski, Esq.  
RE: Technical Memorandum: Zoning By-law Legal Review  
DATE: March 27, 2006

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I have reviewed Royalston's existing zoning by-law with the following objectives:

1. To highlight internal inconsistencies;
2. To identify areas that are non-compliant with statute or case law;
3. To identify vulnerabilities in the by-law;
4. To identify omissions that should be rectified by regulation;
5. To make other suggestions to modernize the by-law;

It is not the intent of this memorandum to identify planning objectives represented in other documents or those that may constitute a change in policy.

## ZONING REVIEW AND ANALYSIS

***Introductory Comments:*** *I used the version of the by-law dated May 8, 1987, in my review. Also considered was a version containing failed amendments from 2005. Analysis has been provided on both aspects, where appropriate.*

*The by-law is reasonably organized, although I am suggesting some areas of improvement. Good elements are present, which I will emphasize throughout this memorandum.*

*There are also some limitations and vulnerabilities:*

- 1. Purpose Section is inadequate*
- 2. No Authority Section*
- 3. All references to specific dates are suspect. The AG's Office is of the opinion that preferential treatment for established uses violates the uniformity requirement of G.L. c. 40A, s.4. This interpretation can undo the very delicate political compromises that lead to the initial enactment.*
- 4. Definitions are outdated and incomplete.*
- 5. Accessory Uses should be delineated in a separate Use chart, not in a definition.*
- 6. Nonconforming Uses is obsolete.*
- 7. The parking, loading and signage provisions can be loosened up by allowing special permit relief for certain aspects. Some examples: variations on the number and size of signs could be allowed by special permit; Reduced parking or loading could be permissible by special permit. This approach offers more flexibility to site planning and may present opportunities for public/private partnerships.*
- 8. Overlay Districts may be subject to a SCIT attack. Further discussion required regarding legislative intent. See detailed discussion.*
- 9. Variances?*
- 10. Earth Removal; Filling; no provisions*
- 11. Alternative Residential Developments can be modernized and made more flexible to encourage use in place of conventional subdivisions.*
- 12. Special Permit language is confused with Site Plan Approvals.*
- 13. Landscaping provisions are absent.*

*My overall assessment is that the by-law is functional, fairly comprehensive, but somewhat outdated. It's vulnerabilities are twofold: gaps in the by-law, and sections that no longer comport with settled law.*

## **Analysis**

One goal of this analysis is to recommend an expandable format for the new by-law, with “chapters” that are intuitive and can be followed by laypeople with ease. My suggestion in this regard is similar to Royalston’s current format, with some adjustments:

Section 1. Purpose, Authority, and Organization  
Formerly Section I

Section 2. Establishment of Districts.  
Formerly Section III

Section 3. Use Regulations.  
Formerly Section IV

Section 4. Rename “Intensity Regulations” to “Dimensional and Bulk Requirements”  
Formerly Section V

Section 5. General Regulations (Signs, Parking, etc.)  
Formerly In Section IV

Section 6. Special Nonresidential Regulations (Earth Removal, Adult Uses, Wireless, etc.)  
Formerly Section IVK

Section 7. Special Residential Regulations (cluster, etc.)  
Formerly Section VII

Section 8. Special Districts (flood plains, Adaptive Reuse, etc.)  
Formerly Section IV H-J

Section 9. Administration (permitting, etc.).  
Formerly Section VI

Section 10. Definitions.  
Formerly Section II

The remainder of this analysis moves through Royalston’s existing by-law in order, with comments and analysis where appropriate.

**Section I:** This should be both a “purpose” and “authority” section. As such, it should be rewritten to incorporate the objectives set forth in 1975 Mass. Acts 808, s. 2A or to refer to this provision. This uncodified section of the Zoning Act states:

The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder.

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: -- to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives. Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating:

1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;
2. size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of Sections 29-33, inclusive, of Chapter 93, and to Chapter 93D;
3. uses of bodies of water, including water courses;
4. noxious uses;
5. areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;
6. density of population and intensity of use;
7. accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and
8. the development of the natural, scenic and aesthetic qualities of the community.

The purposes suggested in section 2A have been cited as a guide to the legitimate exercise of the zoning power. See, e.g., *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 (1980). These extensive powers "are not to be narrowly interpreted." *Collura v. Town of Arlington*, 367 Mass. 881, 885 (1975)(citing *Decoulos v. City of Peabody*, 360 Mass. 428, 429 (1971)).

The Home Rule Amendment, Article 89 of the Constitution, acts in conjunction with section 2A to establish the purposes and authority of the zoning power. It should be referenced in a separate section stating the "Authority" by which the zoning power may be implemented.

I disagree with the proposed amendment: it is not necessary and confuses Purpose and Authority.

**Section II:** Move to Proposed Section 10. It is essential that all definitions be located in a single section, and it is preferable that the section be at the end of the by-law or document, where glossaries are usually found, rather than at the beginning like a Table of Contents. Definitions should be just that: definitions. Royalston's definitions are intermixed with regulatory language, which should be located elsewhere, in most cases the Use Chart.

The definitions require some modernization, as well as additions. Some of the principal uses available in the districts are undefined. All uses in the Use Chart require definitions. Examples of inadequate definitions:

- "frontage" can be defined to require (a) continuous unbroken linear availability, (b) through which actual access must be obtained to the lot. You can require that access to double frontage lots be through the qualifying frontage;
- "street" is undefined. It can be defined to require security for streets shown on subdivision plans;
- "lot width" is undefined, and can be used to control contorted shapes;
- "lot area" is undefined, and can be used to eliminate rat tails.

There are plenty of others that are candidates for discussion. I can provide a list of modernized definitions, customized for Royalston.

**Section III.B. (Boundaries):** This is hardly adequate; there are usually more devices offered in a typical by-law to interpret boundary lines. Has Royalston experienced any problems related to the interpretation of zoning boundaries?

**Section IV:** Uses that are exempt by statute are not mentioned. Riding Academy: have you done a comprehensive build-out to determine lack of appropriate parcels?

**Sections IV:** Accessory Uses are delineated awkwardly. All allowable Accessory Uses should be listed and defined. Principal and Accessory Uses should be listed in two separate tables. Many of the uses will need clarification. For example, agricultural uses are not well-defined, or are too narrowly defined. There are statutory definitions in G.L. c. 128, s.1A, G.L. c. 111, s. 1, and G.L. c. 61A, s.1 that broadly define agriculture. You may also want to consider two categories of Accessory Uses: those allowed by right, and those allowed by special permit.

**Section IV.D (Nonconforming Uses):** This is seriously obsolete. A modern set of rules for nonconforming uses and structures to meet the requirements of recent case law should be substituted. There have been a handful of decisions in the past 15 years that fundamentally changed practice here. Your existing section also does not meet the standards imposed by *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32 (1991), in which the court required that all allowable changes to nonconformities be listed in the by-law.

There is no mention of demolition or "tear-downs" and subsequent reconstruction. Many cities and towns, following Lexington's example, have provided for such change by local ordinance or by-law. You may want to consider this option, as it could lead to positive redevelopment and less pressure to develop open land. A model by-law will be provided.

**Section IV.F:** (Signs) Move to proposed Section 5: General Regulations. We can discuss this, but signage is a tough issue and it's usually best to leave it alone, barring a glaring problem.

**Section IV.G:** (Parking Requirements) Move to proposed Section 5: General Regulations

**Section IV.G.2:** (Parking Requirements at the discretion of the Planning Board): This is problematic. Due process requires that all rules be stated in advance, and not be subject to the

whims of board members or administrators.

**Section IV.H through J (Overlay districts):** Move to Proposed Section 8: Special Districts

**Section IV.H through J (Overlay districts):** All of your overlay districts should be checked for conformance with the SCIT doctrine. In *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass App. Ct. 101 (1984), the Appeals Court found it illegal to confer on local boards "a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." *Id.* at 108. In *Gage v. Town of Egremont*, 409 Mass. 345 (1991), the Supreme Judicial Court ruled that not *all* uses in a district could be placed on special permit. "[A] zoning by-law must permit at least one use in each zoning district as a matter of right." *Id.* at 348. In *Boch v. Planning Board of Tisbury*, 5 LCR 16 (1997), the Land Court ruled that the SCIT doctrine is applicable in overlay districts. Upon first review, it is unclear whether Royalston's Flood Plain overlay district contemplates any substantial use as of right (other than exempt agricultural uses) and may be in violation of the doctrine. Further analysis required.

**Section V.A. (Intensity Regulations):** The temporary language is obsolete and probably illegal, due to recent court decisions. Phased Growth is an option here. Phased Growth, when tied to a legitimate Master Planning process, can be implemented over a short period of time, slowing development and/or encouraging better development.

**Section VI.A (Special Permits):** The criteria set forth in subsection A could be better. A model Special Permit by-law will be provided. Consider the following to modernize this section:

Special permits shall be granted by the Special Permit Granting Authority, unless otherwise specified herein, only upon its written determination that the adverse effects of the proposed use will not outweigh its beneficial impacts to the city or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site. In addition to any specific factors that may be set forth in this ordinance, the determination shall include consideration of each of the following:

1. Social, economic, or community needs which are served by the proposal;
2. Traffic flow and safety, including parking and loading;
3. Adequacy of utilities and other public services;
4. Neighborhood character and social structures;
5. Impacts on the natural environment; and
6. Potential fiscal impact, including impact on city services, tax base, and employment.

**Section VI. (Site Plan Review Special Permit):** There are serious issues here. A model Site Plan Review by-law will be provided. In *Y.D. Dugout v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970), the Supreme Judicial Court defined its understanding of site plan review as: "regulation of a use rather than its prohibition . . . (guiding) us in interpreting the (by-law) . . . as

contemplating primarily the imposition for the public protection of reasonable terms and conditions." The Supreme Judicial Court has repeatedly focused on this pronouncement to distinguish site plan review from the special permit process. See *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986); *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998 (1981). Site plan review can only be used to shape a project. On the other hand, in the special permit process, the full range of discretion is available to the granting authority.

Subsections B-C blends the two legal concepts and needs comprehensive reworking.

Notes that may or may not be relevant:

- Subdivisions should not be subject to site plan review; is this section intended to encompass subdivisions?
- Most towns fix the site plan review power in the Planning Board, since this type of review deals with design issues, something with which ZBAs are less familiar.

**Section VI.C.4 (Site Plan Review Special Permit, Development Timing):** There are concerns here based on a phased-growth case out of Hadley in the past year. Phased Growth must be tied to a master planning effort and must have a sunset provision.

**Section VII.A.(Interior Lot Development):** Very restrictive. Let's discuss purpose.

**Section VII.B.(Flexible Developments):** Should require Site Plan Approval, at a minimum. Existing dimensional/intensity requirements are not flexible enough. There is no control over site aesthetics.

**Section VII.C.(Open Space Developments):** The details here are somewhat onerous. You may want to consider streamlined version, which I can provide. The goal here is to encourage alternative developments to conventional subdivisions.

**Section IVK.(Telecommunication Tower and Wireless):** Adequate.

**Section ??: Variances?**

### **Missing Sections For Consideration**

**General Landscaping Requirements:** The by-law has no landscaping guidelines. It does not address the screening of parking areas, loading areas, dumpsters, HVAC equipment, and outdoor storage areas.

**Earth Removal and Filling:** Missing.

**Hilltop Development/clearing:** At a minimum, you should have simple regulations for clearing hilltops.

**Residential Options:** The ordinance provides for small flexible developments, but not very imaginatively or flexibly. Some residential alternatives would include: townhouse development, assisted living facilities, congregate or independent living facilities, and age-restricted housing.